

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DECONDIA RASHAWN MIXON,

Defendant-Appellant.

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UNPUBLISHED

March 17, 2009

No. 281417

Livingston Circuit Court

LC No. 04-014436-FH

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of carrying a concealed weapon, MCL 750.227. Defendant was convicted at his second trial; the first trial ended in a hung jury. We affirm.

Defendant was arrested on an unrelated felony warrant when he appeared at the Livingston County Gun Board to renew his carrying a concealed weapon permit. Defendant's permit was expired. According to police, while defendant was being patted down for weapons upon arrest, he was questioned about whether he had any weapons. He responded that there was a handgun in his vehicle. According to defendant, he was walking down the hall with a deputy when a Sergeant informed him that his vehicle was to be towed and asked whether there was anything in it.

On appeal, defendant first argues that a *Miranda*<sup>1</sup> violation occurred when he was interrogated about whether he possessed any weapons. Because *Miranda* warnings were not given, the gun seized from the vehicle on the basis of that statement was the fruit of a poisonous tree and should be suppressed. The trial court disagreed, finding that the public safety exception applied to the questioning. Implicit in that ruling was the finding that the deputy was credible when he testified at the suppression hearing. We review de novo a trial court's decision on a motion to suppress. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001).

Although the prosecution generally may not use a defendant's statements as evidence unless he received *Miranda* warnings before questioning, there are exceptions to this rule. For

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<sup>1</sup> *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

example, *Miranda* warnings may be excused when there are public safety concerns. *New York v Quarles*, 467 US 649, 651; 104 S Ct 2626; 81 L Ed 2d 550 (1984). For the public safety exception to apply, there must be an “immediate” public safety concern. *People v Attebury*, 463 Mich 662, 670; 624 NW2d 912 (2001). The concern applies to both officers and the general public. *Id.* at 671. There is “a specific distinction between questions objectively necessary to secure the public safety and those with an investigatory purpose.” *Id.*; See also *Quarles*, *supra* at 659 n 8. And, “only the former can trigger application of the public safety exception.” *Attebury*, *supra* at 671. “The ‘fruit of the poisonous tree’ doctrine proscribes the introduction at trial of any evidence indirectly obtained through illegal means.” *People v Gunn*, 48 Mich App 772, 777; 211 NW2d 84 (1973). Thus, evidence obtained after a *Miranda* violation may be deemed to be “fruits” of the officers unlawful action and inadmissible. See e.g. *People v Grevious*, 119 Mich App 403, 409; 327 NW2d 72 (1982); *Wong Sun v United States*, 371 US 471, 484-486; 83 S Ct 407; 9 L Ed 2d 441 (1963).

But here, there was no *Miranda* violation because the deputy’s question fell squarely within the public safety exception to *Miranda*. The question was objectively reasonable to protect a police officer and the general public from any hidden weapons defendant may have had. The deputy only asked whether defendant had any weapons and not other broader questions relating to the investigation of a crime. The statement was not subject to suppression, and the subsequent seizure of the gun was not the fruit of a poisonous tree because the statement was legally obtained, and there was probable cause to believe that contraband was in the vehicle. See *People v Kazmierczak*, 461 Mich 411, 422; 605 NW2d 667 (2000); *Gunn*, *supra* at 778. On the record, the trial court did not err in refusing to suppress defendant’s statement or the gun.

Defendant also argues that his defense counsel argued three defenses that were so patently deficient in light of the facts that defendant was deprived of the effective assistance of counsel. Thus, the trial court erred in denying defendant’s motion for a new trial on this ground. To establish ineffective assistance of counsel during trial, defendant must show that his trial counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel’s errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To establish that his trial counsel’s performance was deficient, “defendant must overcome the strong presumption that his counsel’s action constituted sound trial strategy under the circumstances.” *Toma*, *supra* at 302. We review the trial court’s denial of defendant’s motion for new trial for an abuse of discretion and the trial court’s factual findings for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). We review questions of law de novo. *In re Contempt of Tanksley*, 243 Mich App 123, 127; 621 NW2d 229 (2000).

It appears defendant had no viable defenses in this case. Defendant had an expired CCW permit and admitted he had a gun in his vehicle. When denying defendant’s motion for a new trial, the trial court found that defense counsel’s arguments were part of her trial strategy to nullify the jury. “Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence.” *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992). We conclude that defense counsel’s attempt to invoke jury nullification by focusing on the fact that defendant’s intent was to get the gun registered and inspected for its safety, that the gun may not have been operable, and that defendant did not

physically possess the gun, was sound trial strategy. Therefore, trial counsel's representation did not fall below an objective standard of reasonableness. In addition, there is no a reasonable probability that but for defense counsel's arguments, the results of the trial would have been different. Defense counsel's jury nullification defense was reasonable under the circumstances, and we do not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). In reaching our conclusion, we note that defendant has not provided this Court with any alternative defenses which may have resulted in an acquittal and that defense counsel used the same defenses and trial strategy in the second trial as he did in the first trial, which resulted in a hung jury. Consequently, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

We affirm.

/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey